United States Department of the Interior

BUREAU OF LAND MANAGEMENT
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In Reply Refer To:

December 4, 2017

CERTIFIED MAIL 7012 1640 0000 3798 6448
RETURN RECEIPT REQUESTED

Bruce Pendery
The Wilderness Society
440 East 800 North
Logan, UT 84321

DECISION

PROTEST DISMISSED

I. INTRODUCTION

On September 13, 2017, a Lease Sale Notice for the Miles City Field Office (MCFO), December 12, 2017, Competitive Oil and Gas Lease Sale was posted, which initiated a 30-day protest period. At the same time, the MCFO Oil and Gas Leasing Environmental Assessment (EA), updated after a 30-day public comment period, was made available to the public.

In a fax to the Bureau of Land Management (BLM) dated October 13, 2017 (Enclosure 1), the Wilderness Society (WS) and National Audubon Society (NAS) submitted a timely protest to the inclusion of 204 parcels located in the MCFO planning area, Montana.

II. BACKGROUND

Public scoping for this lease sale was conducted from May 16-30, 2017. This scoping period was announced in a press release issued by the Montana State Office. The MCFO also posted National Environmental Policy Act (NEPA) notification log, reference number DOI-BLM-MT-C020-2017-0051-EA. In addition, the Montana State Office mailed surface owner notification letters explaining the oil and gas leasing and planning processes. The letters requested written comments regarding any issues or concerns that should be addressed in the EA being prepared for the parcel. The MCFO received a total of five (5) scoping comments regarding the leasing process, split estate, and water resources. The WS and NAS did not submit scoping comments.

On July 10, 2017, the BLM Montana/Dakotas released the MCFO Oil and Gas Leasing EA for a 30-day public comment period. The EA analyzed the potential effects from offering 204 nominated lease parcels in Montana containing 98,889 acres of Federal Mineral Estate in the December 12, 2017, Competitive Oil and Gas Lease Sale. Relevant public comments received during this process were addressed in the EA, as appropriate. The WS submitted comments on the EA at that time. The NAS did not. The EA was updated and posted, along with the competitive sale list, on September 13, 2017, on the BLM's ePlanning website for a 30-day protest period.

After a review of potential environmental impacts presented in the EA and the public comments, the Miles City Field Manager recommended that 204 parcels be included in the December 12, 2017 lease sale. As a result of the Decision Record, a total of 204 nominated MCFO lease parcels (98,889 acres of Federal minerals) would be offered for lease at the MCFO, December 12, 2017, Competitive Oil and Gas Sale with lease stipulations and/or lease notices as necessary for the proper protection and conservation of the resources associated with the lease issuances.

III. PROTEST ANALYSIS

Protest Summary: WS and NAS submitted a timely protest (via fax) dated October 13, 2017, to the inclusion of 204 parcels identified in Appendix A (Enclosure 3) in the MCFO, December 12, 2017, Notice of Competitive Oil and Gas Lease Sale.

Protest Contentions and BLM Response:

1. BLM has Failed to Consider a Reasonable Range of Alternatives in the December EA

> The National Environmental Policy Act (NEPA) requires that BLM analyze in detail "all reasonable alternatives." 40 C.F.R. § 1502.14(a). The range of alternatives is the heart of a NEPA document because "[w]ithout substantive, comparative environmental impact information regarding other possible courses of action, the ability of [a NEPA analysis] to inform agency deliberation and facilitate public involvement would be greatly degraded." *New Mexico v. Bureau of Land Management,* 565 F.3d 683, 708 (10th Cir. 2009). This requirement applies equally to EAs. See 42 USC. §§ 40 C.F.R. § 1508.9(b); *see also Bob Marshall Alliance v. Hodel,* 852 F.2d 1223, 1228-29 (9th Cir- 1988). That analysis must cover a reasonable range of alternatives so that an agency can make an informed choice from the spectrum of reasonable options.
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> The December EA for the Miles City Field Office December, 2017 lease sale fails to meet this requirement. It only analyzes two alternatives:
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> -The No Action alternative, which would not offer any lease parcels at this sale; and
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> -The Proposed Action where 204 lease parcels covering approximately 98,889 mineral estate acres would be offered (we will refer to this as the Lease Everything Alternative).

December EA at 10.

> An EA offering a choice between leasing every parcel nominated, and leasing nothing at all does not present a reasonable range of alternatives. The BLM has deferred the sale of parcels in sage-grouse habitat since the Miles City Field Office Resource Management Plan (RMP) was approved in 2015, but not at this sale. See December EA at 265 (noting parcel deferrals in past lease sales). So, it is clear there are options available besides the "lease everything alternative" that is the only alternative actually considered in this sale.
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> In fact, there is a cluster of 132 of the parcels proposed for sale that are in sage-grouse habitat that are isolated from existing leases and which have low potential for successful oil and gas development. See Figure 1 in our comments submitted on August 10, 2017 on the December EA.

Deferral of these parcels would allow BLM to reasonably consider an alternative besides the Lease Everything Alternative.

BLM must consider reasonable alternatives that fall between the two extremes. In particular, the agency should analyze one or more alternatives for prioritizing leasing outside of high-quality sage-grouse habitat. BLM should have considered an alternative that would not offer all the 204 lease parcels that overlap with sage-grouse general habitat management areas (GHMA). At a minimum, parcels could be deferred from leasing, especially if they contain nesting habitat, leks, or winter concentration areas. Failing to analyze such a middle-ground option violates NEPA. *See The Wilderness Society v. Wisely*, 524 F. Supp. 2d 1285, 1312 (D. Colo. 2007) (BLM violated NEPA by failing to consider "middle-ground compromise between the absolutism of the outright leasing and no action alternatives"); *Muckleshoot Indian Tribe v U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (NEPA analysis failed to consider reasonable range of alternatives where it "considered only a no action alternative along with two virtually identical alternatives").

Moreover, the December EA provides no meaningful analysis of what the impacts on these parcels will be if the leases do get developed. The December EA states that it cannot predict the impacts from development at the leasing stage. December EA at 7, 43. BLM's own position illustrates why options that defer at least some of these parcels should have been considered. BLM has not completed the analysis to determine what impacts are likely under the stipulations proposed for these leases, and whether those stipulations will be adequate to prevent significant adverse impacts to sage-grouse and other resources such as water supplies and public health. Nor can BLM conclude that the potential economic benefits of leasing these parcels outweigh the environmental and economic harms to the local community and other resources.) But by leasing these lands now, BLM will make an irreversible commitment of resources limiting the government's options if and when companies seek to drill for Oil and gas in these areas. If leases are issued now, it becomes difficult or impossible for BLM to change course later.

As stated by the Tenth Circuit Court of Appeals,

> ...we first ask whether the lease constitutes an irretrievable commitment of resources. Just as we did in *Pennaco Energy*, 377 F.3d at 1160 and the D.C. Circuit did in *Peterson,* 717 F.2d at 1412, 1414, we concluded that issuing an oil and gas leases without an NSO stipulation constitutes such a commitment.

New Mexico v- Bureau of Land Management, 565 F.3d 683, 718 (10th Cir. 2009). Thus, it is clear that the leasing stage is when a full range of reasonable alternatives must be considered because this is when BLM is making an irreversible and irretrievable commitment of resources.

Similarly, the Finding of No Significant Impact (FONSI) proposed for this project does not meet the standards required to issue a FONSI. Council on Environmental Quality (CEQ) regulations only allow a FONSI if an agency validly concludes its project "will not" significantly affect the human environment. 40 C.F.R. § 1508.3. In reaching this conclusion the BLM considered the context of the project and the ten "intensity" factors specified in the CEQ regulations. *Id.* § 1508.27. The BLM's conclusion that there will not be significant impacts to the human environment is misplaced.

The analysis of the context factor in the proposed FONSI misses the mark as defined by regulations at 40 C.F.R. § 1508.27(a). All the BLM does in the proposed FONSI is consider the overall purpose and mission of oil and gas leasing but it does not consider the impacts of the leasing on society as a whole, the affected region, the affected interests, or the locality of the leasing. *See* Proposed FONSI at unnumbered page 2. Short- and long-term effects are not considered. Yet as much as 98,889 acres (nearly 155 square miles) could be irreversibly and irretrievably leased. This is clearly a significant context.

And as to the ten intensity factors at 40 C.F.R. 1508.27(b), in several cases the BLM claims the factors do not reach a level of intensity warranting preparation of an environmental impact statement because leasing does not have land disturbance associated with it. But as we have discussed, leasing does represent an irreversible and irretrievable commitment of resources, so these analyses are misplaced. In addition, factor three, the uniqueness of the area, also misses the point because it does not consider the fact many of these parcels are in sage-grouse GHMA, which are clearly an important, unique resource. See Proposed FONSI at unnumbered pages 2-3. Likewise, as we will discuss, BLM's analysis of factor nine, the BLM sensitive species issue, is off the mark because it does not consider the sage-grouse prioritization factors as required under BLM's RMPs. See *id.* at unnumbered page 4. The consideration of cumulative impacts is also misplaced because the BLM does not reconcile the leasing of these 204 parcels with the large number of existing leases in the area. Had BLM considered a broader array of alternatives, a FONSI might be more appropriate and justifiable.

And in this EA, unlike leasing EAs we have seen in other states, such as Wyoming and Nevada, for example, the BLM did not even consider any other alternatives before deciding whether to fully analyze them. There is no Alternatives Considered but not Analyzed in Detail section of the December EA, which reinforces the inadequacy of the range of alternatives considered in the December EA.

In choosing alternatives to consider in a NEPA document, BLM is to ensure it can make a "reasoned choice." BLM NEPA Handbook H-1790-1 at 49. "In determining the alternatives to be considered, the emphasis is on what is "reasonable" rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant."" *Id.* at 50 (citing the CEQ Forty Most Asked Questions Concerning CEQ's NEPA Regulations). Moreover, "[y]ou must consider alternatives if there are unresolved conflicts concerning alternative uses of available resources." *Id.* at 79 (citing 40 C.F.R. § 1508.9(b)). Under its own guidance, BLM clearly needed to consider more than just lease nothing or lease everything alternatives.

At a minimum, given its obligations under the sage-grouse plan amendments, BLM needed to consider one or more deferral alternatives in sage-grouse GHMA, Further, other alternatives that focused on protecting other resources could have been considered. As the December EA recognizes and analyzes, other important resources in the Miles City Field Office include air quality and climate change issues, soil resources, water resources, and cultural resources, among others. Certainly at least one alternative focused on protecting some of these resources could have been considered.

We raised this issue in our comments on the December EA. In response to these concerns the BLM rejected them and stated that it had followed the prioritization guidance in Instruction

Memorandum (IM) 2016-143 and that nothing more was needed in terms of considering other alternatives. December EA at 266. While as will be discussed below we disagree that BLM has appropriately applied IM 2016-143, even if that prioritization was properly applied, it does not answer the concern we have raised: The fundamental legal flaw in the EA is that a reasonable range of alternatives has not been considered.

A summary treatment of alternatives, as has occurred here, "must be measured against the standards in 42 U.S.C. § 4332(2)(E) and 40 C.F.R. 1508.9(b)." *Davis v. Mineta*, 302 F.3d 1 104, 1120 (10th Cir. 2002) (noting these provisions require an agency to study, develop and discuss appropriate alternatives and to briefly describe those alternatives). An agency's rejection of alternatives be deemed illegal if the consideration is "so vague and unspecific as to be little more than platitudes." *Id.* at 1121. In a case where "[a]lternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion that is was unreasonable to consider them as viable alternatives in the EA" the agency's action will be rejected. *Id.* at 1122. As here, *Davis* involved a situation where the agency only considered two alternatives in its EA, the no action alternative and the preferred highway construction alternative, which the court deemed illegal.

Here we have nothing more than platitudes being used to reject consideration of additional alternatives in the December EA. We have BLM's bare assertion that it complied with IM 2016-143 in rejecting deferral of parcels in sage-grouse habitats. December EA at 266. And even where application of this IM is considered in Appendix D, all BLM can say is that it "took into account" expressions of interest, the Greater sage-grouse plan decisions and goals, the prioritization sequence policy, other resource values, and workload capacity for this lease sale review. December EA at 261. It "considered" the IM 2016-143 prioritization sequence and parcel-specific factors. *Id.* at 261-62. But nowhere is there any analysis of these issues, they are just asserted to have been considered. This does not meet the legal requirements for analyzing a reasonable range of alternatives in an EA.

BLM Response:

The BLM analyzed all parcels in the EA to determine what stipulations from the RMP needed to be applied and if those stipulations are still adequate. The Miles City RMP is a very recent RMP and a robust analysis was done on the stipulations and management actions for greater sage-grouse and all other resources, using an up-to-date Reasonably Foreseeable Development Scenario. Restoration Habitat Management Areas are a no-surface occupancy (NSO) stipulation for GRSG, and General Habitat Management Areas are a combination of NSO and controlled surface use (CSU); therefore, providing high levels of protection for the species. The field office followed the prioritization requirement of the RMP, deferring these parcels for several sales since the RMP was signed (while other parcels in the field office were leased instead). Since these parcels have stringent resource protections for all resources (NSO, CSU), and they followed the prioritization process, there was no need to analyze an alternative excluding such parcels (i.e., no environmental impact issues dictating a need to look at an alternative with fewer parcels).

2. BLM is Not Meeting the Multiple Use Requirements of FLPMA

In our August 10 comments on the December EA we pointed out that BLM cannot adopt a policy of dominance for energy development on public lands at the expense of other resources and public land values. BLM's proposal to attempt to lease all 204 parcels represents a rejection of the multiple use mandate. This is prohibited under the terms of FLPMA. *See, e.g.* 43 U.S.C. §§ 1701 (a)(8), 1701 (c), 1702(1), 1732(a), and 1732 (b).

BLM rejected these concerns, referring to section 4.1 of the December EA where it points out that actual development cannot occur at the leasing stage. December EA at 275. It also said that the applicable RMP allows leasing of these lands. *Id.*

But these bare assertions do not change the fact that BLM is giving overwhelming priority to oil and gas development on the public lands at the expense of all other values. As noted above, leasing represents an irreversible and irretrievable commitment of resources to allow oil and gas drilling to occur on the public lands and mineral estate. As we noted in our August 10 comments, "energy development is an allowable use that must be carefully balanced with other uses." Leasing all 204 parcels represents an attempt to give dominance to oil and gas development, not balance, which is not permitted under FLPMA.

Even if the applicable RMP permits leasing of these lands, leasing is not mandated. "Under applicable laws and policies, there is no presumed preference for oil and gas development over other uses." IM 2010-117 at 2. And as will be discussed in more detail below, under BLM's sage-grouse conservation guidance, leasing many of these lands is not in conformance with the multiple use mandate. If BLM were giving balance to oil and gas development, as it is required to do under the FLPMA multiple use mandate, it would not seek to lease all 204 of these parcels at the same time.

While this administration has expressed a commitment to "energy dominance" and an executive order stating this position has been issued, that approach has no legal basis and is rejected by FLPMA. Similarly, the policy direction stated by the Department of the Interior and incorporated in various Secretarial Orders cannot override the fundamental laws governing BLM's management of public lands and minerals.

None of these administrative directives can override the statutory directives in FLPMA. It is the policy of the United States to protect natural resources on the public lands.
43 U.S.C. § 1701(a)(8). Multiple use means "the use of some of the land for less than all of the resources" as well as the "harmonious and coordinated management" of the resources "without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources..." *Id.* § 1702(c). Managing in compliance with the definition of multiple use is mandated, and this management must "prevent unnecessary or undue degradation of the lands." *Id.* § 1732(a) and (b).

Thus, as we noted in our August 10 comments, Federal courts have consistently rejected efforts to affirmatively elevate energy development over other uses of public lands. In the seminal case, *New Mexico ex rel. Richardson v. BLM*, the Tenth Circuit put to rest the notion that BLM can manage chiefly for energy development, declaring that "[i]t is past doubt that the principle of multiple use does not require BLM to prioritize development over other uses." 565 F.3d 683, 710 (10th Cir. 2009); *see also S. Utah Wilderness Alliance v. Norton*, 542 U.S. 52, 58 (2004) (defining "multiple use management" as "striking a balance among the many competing uses to which land can be put"). Other federal courts have agreed. *See, e.g. Colo. Envtl. Coalition v. Salazar*, 875 F.
Supp. 2d 1233, 1249 (D. Colo. 2012) (rejecting oil and gas leasing plan that failed to adequately consider other uses of public lands).

IM 2010-117 reiterates the need to consider multiple use values in leasing decisions.

Although BLM seeks to implement these policies in its approach to oil and gas leasing, seeking to lease all 204 parcels that have been proposed for sale at the December lease sale would violate BLM's multiple use mandate as part of promoting a policy of "energy dominance" on the public lands. But this is not permitted under FLPMA.

BLM Response:

The Miles City Field Office RMP does incorporate the full multiple use policy of FLPMA. The MCFO RMP has areas prioritized for ACEC management, management of visual resources and/or National Scenic and Historic Trails, areas prioritized for the management of recreation and various wildlife species. The RMP also allows development of oil and gas and coal resources and put the suitable constraints on these development activities. There is a large portion of the RMP area that has major constraints on activities (e.g., exclusion areas for wind or other rights-of-ways, no surface occupancy for oil and gas, etc.). This RMP was developed under the FLPMA and NEPA requirements and follows multiple use and sustained yield requirements. This lease sale analyzed and attached all the appropriate stipulations to allow both development of minerals and protection of resources.

It is the policy of the BLM to make mineral resources available for use and to encourage development of mineral resources to meet national, regional, and local needs. This policy is based on various laws, including the Mineral Leasing Act of 1920 and the Federal Land Policy and Management Act of 1976 (FLPMA). The Federal Onshore Oil and Gas Leasing Reform Act of 1987 Sec. 5102(a)(b)(1)(A) directs the BLM to conduct quarterly oil and gas lease sales in each state whenever eligible lands are available for leasing.

- 43 C.F.R. § 3120.1-2

  Each proper BLM State Office shall hold sales at least quarterly if lands are available for competitive leasing.

- Mineral Leasing Act of 1920 as amended- Subtitle B Federal Onshore Oil and Gas Leasing Reform Act of 1987 (FOOGLRA)

  Lease sales shall be held for each State where eligible lands are available at least quarterly....

- Washington Office Instruction Memorandum 2010-117 Oil and Gas Leasing Reform

  State offices will continue to hold lease sales four times per year, as required by the Mineral Leasing Act, section 226(b)(1)(A) when eligible lands are determined by the state office to be available for leasing.

- Montana State Office Oil and Gas Leasing Reform Implementation Plan August 2010

  All Montana Oil and Gas Competitive Lease Sales are subject to the following laws, regulations and policies: Required by law and regulation to hold lease sales at least quarterly if lands are available (Public Law 100-203, Sec. 5102, dated 12/22/87 (FOOGLRA)).

3. BLM has Not Met Its Obligation to Prioritize Leasing Outside of Sage-Grouse Habitats.

As we discussed in our August 10 comments, the December EA is legally flawed because it fails to comply with the direction established in the governing RMPs for sage-grouse conservation. It does not comply with the requirement to give "priority" to leasing outside of GHMA. Of the 204 parcels proposed for sale at this lease sale, 180 are in GHMA and 7 are in Restoration Habitat Management Areas. December EA at 27-28. Yet BLM proposes to not defer the sale of any of these parcels. This does not comply with the governing RMPs, and thus among other things violates section 302(a) of FLPMA. *See* 43 U.S.C. § 1732(a) (requiring public lands management to be conducted in accordance with governing RMPs).

The BLM continues to disregard and not comply with this provision in the governing RMPs: "Priority will be given to leasing and development of fluid mineral resources...outside of PHMA and GHMA." Miles City Field Office Approved Resource Management Plan at 2-8 (emphasis added). *See also* Rocky Mountain ARMPA at 1-19 and 1-25 (making equivalent statements). Even if BLM is not required to defer the sale of all parcels in GHMA, it is impossible to see how some of these parcels would not be deferred, if the RMPs and IM 2016-143 were faithfully applied and complied with. "Priority" for leasing of fluid minerals outside of GHMA would be demonstrated by deferring the sale of at least some lease parcels in GHMA.

The priority for leasing is clearly to be outside of GHMA areas, yet BLM is ignoring this direction and doing exactly the opposite: it is prioritizing leasing inside of GHMA. This does not comply with the RMPs, and thus violates the provisions in section 302(a) of FLPMA and BLM's land use planning regulations.

BLM's response in rejecting these concerns was that no development occurs as a result of leasing, it met the prioritization requirements as shown in Appendix D and section 1.3 of the December EA, and applicable RMPs make these areas available for leasing. December EA at 275. But as we discussed above, leasing constitutes and irreversible and irretrievable commitment of resources, and in addition a lease gives a lessee the right to develop oil and gas. Form 3100-11 and 43 C.F.R. § 3101.1-2. Thus, it is clear that leasing has tangible aspects that cannot be ignored if BLM is to meet the commitment to prioritize leasing outside of sage-grouse habitats.

And as to Appendix D of the December EA, as we discussed above: this appendix is notable because it shows that BLM engaged in no analysis whatsoever of the prioritization sequence or the parcel-specific factors that IM 2016-143 requires to be considered. BLM says it "considered" these issues but there is no analysis shown, at all. December EA at 261-62. The BLM restates 1M 2016-143 verbatim (changing only the reference to "BLM State Office" to "the MCFO") but there is no analysis showing that it "consider[ed] lands outside of GHMAs and PHMAs." Likewise, there is no analysis at all as to whether the seven parcel-specific factors were applied in any tangible way that can be traced by a reviewer. Appendix D is nothing but an assertion of compliance with the prioritization sequence and parcel-specific factors with no analysis apparent.

BLM seems to assume the stipulations shown in Appendix B of the December EA meet its obligations to protect sage-grouse. December EA at 253-58. In particular controlled surface use (CSU) 12-30, lease notice (LN) 14-37, and no surface occupancy (NSO) 11-79 and 11-80 are applicable. But these limits are additional mitigation measures required by the RMPs that are supplemental to and in addition to the requirement to give priority to leasing outside of sage-grouse

habitats. These stipulations do not show that BLM has given priority to leasing outside of sage-grouse habitats, as the RMPs require.

And finally, section 1.3 of the December EA is offered as evidence of the prioritization requirement because it shows that the RMPs have not closed these areas to leasing. December EA at 7. But even if the RMPs have not closed these areas to leasing it is also true that they establish a policy that leasing will be prioritized outside of sage-grouse habitats. The BLM has not shown compliance with that requirement. And consequently, the BLM should defer leasing of at least some of the 187 parcels that are in GHMA or other priority habitat.

In particular, the BLM should defer leasing at least the 130 lease parcels that are isolated from any existing leases and which are in an area which has minimal potential for development, as shown in Figure 1 of our August 10 comments. This would still allow leasing to move forward for nearly 80 parcels. And as we noted in our August 10 comments, there is no doubt these parcels are located in an area with minimal potential for development. As the December EA shows, 67,991 acres out of the 98,889 acres proposed for sale (sixty-nine percent) are in areas with low potential for development. December EA at 259. Given this, lease parcels in these areas that are also in sage-grouse habitats should be deferred from leasing. *See* IM 2016-143 at 4 (parcel-specific factor three says leasing should be focused in areas with "higher potential for development" and leasing in these areas is more appropriate than leasing in areas "with lower potential for development"). As the December EA notes, "[o]f the 180 parcels in the GHMA ,there are 45 parcels within 2 miles of a greater sage-grouse lek and 11 parcels within 0.6 miles of a greater sage-grouse lek." December EA at 28. Certainly these parcels should be deferred from leasing. *See* IM 2016-143 at 4. (parcel-specific factor four stating that leasing in areas of lower value sage-grouse habitat is "more appropriate for consideration than parcels in higher-value habitat or close to important life-history habitat features").

BLM Response:

The leasing EA is tiered to the information and analysis and conforms to the decisions contained in the 2015 Rocky Mountain Region Record of Decision (ROD) and Miles City Approved Resource Management Plan (MCFO ARMP). The ROD and ARMP are in compliance with all Federal laws, regulations, and policy. The direct, indirect, and cumulative effects of oil and gas leasing across the Miles City Field Office were evaluated in the FEIS for the ARMP.

As disclosed in Chapter 3 of the EA, offering the 204 parcels for lease would have no direct effects on special status wildlife species and habitat. Any potential effects on wildlife resources from the sale of lease parcels would occur at the time the leases are developed at the Application for a Permit to Drill (APD) stage. For development to occur on a lease parcel, an APD must be submitted, at which time the field office completes NEPA analysis to disclose the impacts from development. A site-specific analysis to further avoid and minimize impacts to sage-grouse and sage-grouse habitat would occur at the APD stage when a specific proposal is identified. The analysis would include disturbance and density analysis to determine if the proposed actions is within limits established in the approved RMP. The analysis would also identify additional site-specific impacts that cannot be discerned or quantified at this time, and would identify the appropriate mitigation measures to be applied as conditions of approval to ensure the conservation and protection of all natural resources, including greater sage-grouse.

The Rocky Mountain ROD Table 1-4 summarizes the major components of the ARMPs and ARMPAs that address specific threats to GRSG and its habitat. Key Management Responses include "Prioritize the leasing and development of fluid mineral resources outside GRSG habitat." ROD at 1-19.

The Rocky Mountain ROD describes prioritization as an "objective" in the plans.

> Prioritization Objective-In addition to allocations that limit disturbance in PHMAs and GHMAs, the ARMPs and ARMPAs prioritize oil and gas leasing and development outside of identified PHMAs and GHMAs. This is to further limit future surface disturbance and encourage new development in areas that would not conflict with GRSG. This objective is intended to guide development to lower conflict areas and as such protect important habitat and reduce the time and cost associated with oil and gas leasing development by avoiding sensitive areas, reducing the complexity of environmental review and analysis of potential impacts on sensitive species, and decreasing the need for compensatory mitigation. ROD at 1-25.

This priority was not included as an allocation decision or management decision in the BLM's RMP revisions and amendments. To clarify how this objective would be implemented by the BLM, on September 1, 2016, the Washington Office issued Instruction Memorandum (IM) 2016-143. This IM only provides guidance on implementation of the land use plans, was not issued for public notice and comment, and therefore does not constitute rulemaking for the BLM.

The BLM is following the prioritization guidance described in IM 2016-143- Implementation of Greater Sage-Grouse Resource Management Plan Revisions or Amendments- Oil & Gas Leasing and Development Sequential Prioritization.

IM 2016-143 acknowledges the allowance of leasing in GHMA or PHMA, and the consideration of other factors.

> This IM does not prohibit leasing or development in GHMA or PHMA as the GRSG plans will allow for leasing and development by applying prioritization sequencing, stipulations, required design features, and other management measures to achieve the conservation objectives and provisions in the GRSG plans. IM at 2.
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> BLM field offices should integrate the above prioritization sequence in their processing of pending permits as they consider the overall workload to fairly and objectively address their permitting prioritization. Only insofar as they are consistent with the prioritization approach described in this IM, BLM field offices may also take into consideration other prioritization considerations, such as considering permitting on a first-in/first-out basis to the extent possible, unit obligation wells, the efficiency to be gained in processing the easiest to complete first, the operator's drilling Plans, workload capacities, and other resource values. IM at 10.

The MCFO evaluated the parcels according to IM 2016-143 and determined that all parcels could be carried forward for analysis in the Leasing EA because the 2015 ARMP includes standards that conserve sage-grouse habitat, and the MCFO staff had sufficient resources to process and analyze all 204 parcels. Within RHMA, surface occupancy and use is prohibited for oil and gas development (NSO 11-79).Within GHMA, surface occupancy and use is prohibited for oil and gas exploration and development within 0.6 mile of the perimeter of greater sage-grouse leks (NSO 11-80), and surface occupancy and use may be prohibited within 2 miles of the perimeter of a lek active in the last five years (CSU 12-30). Had the MCFO parcel list been larger or if there were inadequate staff resources, the Montana Dakotas State Office, in coordination

with the MCFO, could have deferred parcels in greater sage-grouse habitat in accordance with the prioritization sequence criteria and evaluation factors. However, for the December 12, 2017 Lease Sale, parcels were not deferred because MCFO staff were able to conduct the necessary analyses of all parcels.

IM 2016-143 also concedes that the BLM's implementation of its prioritization must be "subject to valid existing rights and any applicable law or regulation, including but not limited to, 30 U.S.C. 226(p) and 43 C.F.R. 3162.3-l(h)." IM at 12. The BLM must follow several statutory and regulatory timeframes for processing oil and gas leases, including those described in the IM. The BLM will continue to comply with these requirements when apportioning agency resources and prioritizing individual permit applications that propose federal oil and gas lease operations, as the IM recognizes.

In the case of the nominated parcels sent to the Miles City Field Office for the December 12, 2017 Lease Sale, there are 187 parcels in BLM-designated habitat for greater sage-grouse.

> The analysis area includes the following delineated greater sage-grouse habitat management areas: Restoration Habitat Management Areas (RHMA) with seven lease parcels, and General Habitat Management Areas (GHMA) with 180 lease parcels. Of the 180 in GHMA, there are 45 parcels within 2 miles of a greater sage-grouse lek and 11 parcels within 0.6 miles of a lek. The remaining 141 parcels are outside of the 2-mile sage-grouse lek buffer. For further discussion on greater sage-grouse habitat delineations refer to the MCFO ARMP Chapter 2, pages 2-1 through 2-16 (BLM, 2015a). EA at 27-28.

A lease parcel prioritization review was completed for the December 12, 2017 lease sale. Appendix D of the leasing EA, Lease Sale Prioritization Sequence Consideration Factors, describes the results of that analysis, and the MCFO rationale and methodology for complying with the greater sage-grouse plans and IM 2016-143.

> The BLM's Authorized Officer, acting under the delegated authority of the Secretary of the Interior, has discretion to determine which public lands will be offered at a lease sale. The Mineral Leasing Act of 1920 (MLA), as amended, provides that lands subject to disposition under the Act "which are known or believed to contain oil or gas deposits may be leased by the Secretary." (30 U.S.C. § 226(a) (emphasis added)). When evaluating Expressions of Interest (EOIs) to lease particular parcels, pursuant to the Competitive Leases Handbook (H-3120-1), the BLM will plan for leasing and development in accordance with the objectives and provisions in the GRSG Plans. EA Appendix D.
>
> The WO IM No. 2016-143 does not prohibit leasing or development in GHMA or PHMA as the GRSG Plans allow for leasing and development by applying prioritizing sequencing, stipulations, required design features, and other management measures to achieve the conservation objectives and provisions in the GRSG Plans. This guidance was not intended to direct the Authorized Officer to wait for all lands outside GRSG habitat areas to be leased or developed before allowing leasing within GHMAs, and then to wait for all lands within GHMAs to be leased before allowing leasing or development within the next habitat area (PHMA, for example). *Id.*
>
> The first two sales since the 2015 MCFO RMP did not lease in PHMA, and the third sale leased only 1 parcel, and this sale has 0 parcels. The BLM has prioritized leasing outside habitat since the 2015 MCFO RMP by deferring these parcels while other areas in the MCFO planning area were leased. EA at 265.

Oil and gas leasing is in compliance with all Federal rules, regulations, and laws, including NEPA, MLA, and FLPMA. Areas open or closed to leasing, and leasing stipulations, are developed and analyzed during Land Use Planning, which includes public participation. The 2015 MCFO ARMP did not designate the parcel lands under review as closed to oil and gas leasing; therefore, MCFO applied the necessary RMP approved resource stipulations to the respective lease parcels, which include stipulations associated with sage-grouse and habitat management identified in the 2015 MCFO ARMP. See Appendix A. This includes CSU 12-30 for 18 parcels in GHMA, LN 14-37 for 180 parcels in GHMA, NSO 11-79 for 7 parcels in RHMA, and NSO 11-80 for 11 parcels in GHMA within 0.6 miles from lek. *Id.*

NSO 11-79 SAGE-GROUSE HABITAT – PRIORITY ARES, WEST DECKER RESTORATION AREA, SOUTH CARTER RESTORATION AREA

Surface occupancy and use is prohibited on all BLM surface and mineral estate within sage-grouse Priority Habitat Management Areas (PHMA) as well as in the West Decker Restoration Habitat Management Area (RHMA), and the South Carter RHMA.

NSO 11-80 SAGE-GROUSE HABITAT- GENERAL HABITAT MANAGEMENT AREA

Surface occupancy and use is prohibited within 6/10 mile of the perimeter of sage-grouse leks.

CSU-12-30 SAGE-GROUSE GENERAL HABITAT MANAGEMENT AREAS

Surface occupancy and use within 2 miles of the perimeter of a lek active within the past 5 years may be restricted or prohibited. Prior to such activities, a plan to mitigate impacts to breeding or nesting sage-grouse; or breeding, nesting, or brood rearing habitat will be prepared by the proponent and implemented upon approval by the AO.

LN 14-37 GREATER SAGE-GROUSE HABITAT CONSERVATION

The lessee/operator is given notice that prior to project-specific approval, the authorized officer may require mitigation measures and/or compensatory mitigation measures to conserve, enhance, and restore Greater Sage-Grouse (GRSG) habitat. The objectives of these requirements are to avoid, minimize, or compensate for unavoidable impacts associated with oil and gas development in order to provide a net conservation gain, which is a benefit or gain above baseline conditions, when the development occurs within Greater Sage-Grouse habitat as specified in the Record of Decision for the Field Office's Approved Resource Management Plan (Sept. 2015). Site-specific GRSG habitat conservation, mitigation, or compensation requirements would be identified during the environmental review process and would be developed into the project proposal or as terms and conditions of the subsequent approval.

4. BLM is not Meeting the MLA Requirement to Prevent the Waste of Natural Gas.

The last issue that we raised with BLM in our August 10 comments on the December EA was the need for BLM to reduce methane waste releases that could result from oil and gas development in order to comply with the MLA. MLA first provides that each lease shall contain provisions to ensure the exercise of "reasonable diligence, skill, and care" in the operation of the lease, and then provides that leases will contain a provision allowing rules "for the prevention of undue waste" that can be prescribed by the Secretary and which "shall be observed." 30 U.S.C. § 187. Next the

MLA provides that all oil and gas leases "shall be subject to the condition that the lessee will...use all reasonable precautions to prevent waste of oil or gas developed in the land..." *Id.* § 225 (emphasis added).

Clearly under the MLA the BLM must take steps to reduce methane waste at the leasing state. Actually, BLM is required to "prevent" the waste of oil and gas. While section 4 of BLM's standard oil and gas lease form (Form 3100-11) provides that lessees must prevent unnecessary waste of the leased resource, this does not fully encompass what the MLA says. This provision does not say that BLM can prescribe rules for the prevention of undue waste, as section 187 provides for. It also does not say that all reasonable precautions to prevent waste will be required, as section 225 provides for. And in the stipulations that BLM has put in place for leases proposed for sale in December there is no mention of waste or the duty to prevent waste. December EA at 253-58 (Appendix B).

As we argued in our August 10 comments, BLM is required to put in place provisions on these leases that will prevent waste. It has not done so. This must be corrected. In its response to these concerns the BLM said that since no development occurs at the leasing stage, it need not do anything to control waste. December EA at 278. But the MLA is explicit, efforts to prevent waste must be taken at the leasing stage, in the leases. BLM also says that it attached lease notice LN 14-18 and controlled surface use CSU 12-23 to the leases and that this would take care of any waste problems. *Id.* But neither of these stipulations say anything about waste or implicate waste except in the vaguest ways, such as providing for future analyses of air pollution levels. *See id.* at 253-254 (describing these stipulations). The BLM seems to also think that it has complied with the applicable RMP and this takes care of any waste issues. *Id.* at 278 (referencing #8). But if the RMP does not require what the MLA requires (rules to prevent waste and all reasonable precautions to prevent waste), and it does not, then this assertion does not save the BLM.

In our August 10 comments we noted several means that BLM might consider to reduce waste which have been used in other Districts and Field Offices. BLM responded to these suggestions by disparaging them and downplaying their utility. December EA at 278-79. But even if BLM does not feel these suggestions have merit, it nevertheless still has an obligation under the MLA to put in place rules to prevent waste and to ensure all reasonable precautions are used to prevent waste. And these provisions must be made in the lease. Again, it has not done this, which is impermissible.

Further, BLM is now required to ensure compliance with its waste prevention rule (the Waste Prevention, Production Subject to Royalties, and Resource Conservation rule). While BLM has tried to stay the effect of its rule, a court has now confirmed that this effort was illegal and confirmed that the rule remains in effect. *State of California v. U.S. Bureau of Land Management,* Case 3:17-cv-03804-EDL (N.D. Cal. October 4, 2017) (copy attached for your reference). BLM must comply with the current rule and, even as the agency moves to consider repealing the rule, BLM must meet its MLA waste prevention obligations, which it has failed to do. This must be corrected.

BLM Response:

The MLA requirements to prevent undue waste and take precautions to prevent waste are being met by the BLM. Without a development proposal or actual production with emissions, any analysis of natural gas waste prevention would be speculative. Actions and requirements to minimize and prevent the waste of natural gas are applied post-leasing at the APD stage of development. The Field Office Petroleum Engineer will review the drilling program component of the APD and require Best Management Practices and

Conditions of Approval to drilling, completion, and production activities to minimize the waste of natural gas according to BLM regulations. As stated in Section 4.1 of the leasing EA,

> Upon receipt of an APD, the BLM would coordinate with the appropriate SMA and initiate a more site-specific NEPA analysis with public review opportunities to more fully analyze and disclose site-specific effects of specifically identified activities. EA at 43.

BLM regulations on preventing the waste of natural gas are described in the final rule- Waste Prevention, Production Subject to Royalties, and Resource Conservation, published on November 18, 2016. The rule is intended to reduce waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases; clarify when produced gas lost through venting, flaring, or leaks is subject to royalties; and clarify when oil and gas production may be used royalty-free on-site.

In response to Secretarial Order No. 3349, issued by Interior Secretary Zinke on March 29, 2017, the BLM is conducting an additional review of the rule to determine if a temporary suspension or delay of certain requirements would avoid compliance costs on operators for requirements that may be rescinded or significantly revised in the near future. During this time, existing federal, state, and tribal regulations will ensure energy development is done in an environmentally sound, safe and responsible manner.

The application of stipulation CSU 12-23 and lease notice LN 14-18 (see below) to the proposed lease parcels will provide for conservation of air resources by ensuring that reduced emissions engine technology is used as the leases are developed, and by allowing BLM to conduct additional air analyses at the time of development if methodologies become available to determine local impacts of project level GHG emissions.

CSU 12-23- Controlled Surface Use Stipulation- Air Resources

> Surface occupancy and use is subject to the requirement that each diesel-fueled non-road engine with greater than 200 horsepower design rating to be used during drilling or completion activities meets one of the following two criteria: (1) the engine was manufactured to meet USEPA NO_x emission standards for Tier 4 non-road diesel engines, or (2) the engine emits NO_x at rates less than or equal to USEPA emission standards for Tier 4 non-road diesel engines. EA at 253.

LN 14-18- Lease Notice- Air Resource Analysis

> The lessee/operator is given notice that prior to project-specific approval, additional air resource analyses may be required in order to comply with the NEPA, FLPMA, and/or other applicable laws and regulations. Analyses may include equipment and operations information, emission inventory development, dispersion modeling or photochemical grid modeling for air quality and/or air quality related value impact analysis, and/or emission control determinations. These analyses may result in the imposition of additional project-specific control measures to protect air resources. EA at 254.

IV. CONCLUSION

The Protesters requested that the BLM withdraw 204 parcels from the MCFO, December 12, 2017, Competitive Oil and Gas Lease Sale. The Protesters contend that the BLM failed to consider a reasonable range of alternatives in the EA, is not meeting the multiple use requirements of FLPMA, has not met its

obligation to prioritize leasing outside of sage-grouse habitats, and is not meeting the MLA requirement to prevent the waste of natural gas.

The BLM dismisses this protest for the reasons stated above.

The BLM, in accordance with existing regulations and policies, will not defer leasing actions and will offer for lease all 204 of the protested parcels described in the MCFO, December 12, 2017, Notice of Competitive Oil and Gas Lease Sale.

Administrative Review and Appeal

This Decision may be appealed to the Interior Board of Land Appeals (IBLA), Office of the Secretary, in accordance with the regulations contained in 43 C.F.R. § 4 and Form 1842-1 (Enclosure 2). If an appeal is taken, the Notice of Appeal must be filed in the Montana State Office at the above address within 30 days from receipt of this Decision. The appellant has the burden of showing that the decision appealed from is in error.

If you wish to file a petition for a stay of the effectiveness of this Decision during the time that your appeal is being reviewed by the Board, the petition for a stay must accompany your notice of appeal. A petition for a stay must show sufficient justification based on the standards listed below. Copies of the notice of appeal and petition for stay must be submitted to the IBLA and the appropriate Office of the Solicitor (see 43 C.F.R. § 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulations, a petition for a stay of a decision pending appeal shall be evaluated based on the following standards:

1. The relative harm to the parties if the stay is granted or denied;
2. The likelihood of the appellant's success on the merits;
3. The likelihood of immediate and irreparable harm if the stay is not granted; and
4. Whether the public interest favors granting the stay.

Sincerely

/s/Donato J. Judice

Donato J. Judice
Deputy State Director
Energy, Minerals, & Realty

2 Enclosures
1- WS and NAS Protest Letter Dated October 13, 2017 (35 pp)
2- Form 1842-1 (2 pp)